Sheet Metal Workers International Association, Local 104, AFL–CIO (Simpson Sheet Metal, Inc.) *and* Douglas Henry. Case 20–CB–8612

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 15, 1992, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed allegations that the Respondent, Sheet Metal Workers International Association, Local 104, violated Section 8(b)(1)(B) of the Act by filing internal union charges against Douglas Henry, a Section 2(11) supervisor, because it believed that Henry had interpreted the collective-bargaining agreement with Simpson Sheet Metal, Inc. in a manner inconsistent with the Respondent's view. For the reasons discussed below, we reverse the judge's conclusion and find that the Respondent violated the Act, as alleged.

The facts, as more fully set forth in the judge's decision, are not in dispute. The Employer is a sheet metal contractor. Henry, a member of the Respondent, is the Employer's second in command. Henry was admittedly a supervisor within the meaning of Section 2(11) of the Act. As part of his duties, Henry settled employees' complaints regarding their travel pay. On these occasions, Henry consulted the relevant contract provisions and, based on his understanding of them, determined whether the appropriate travel pay had been paid. If he determined that an adjustment was required, Henry advised the Employer's payroll department to make the appropriate corrections.

The Respondent's business agent filed internal union charges against Henry alleging that he had violated the Respondent's constitution and bylaws by directing rank-and-file members employed by Simpson to work in breach of the Union's interpretation of the collective-bargaining agreement.

A trial committee heard the charges, found Henry guilty as charged, fined him $10,000, and put him on probation for 3 years. Henry's appeal of the decision was denied. In January 1991, the Respondent's general secretary-treasurer and its financial secretary-treasurer notified Henry that the Respondent intended to institute civil proceedings against him to collect the fine.

The judge concluded, based on his interpretation of the Supreme Court's decision in *NLRB v. Electrical Workers Local 340 (Royal Electric)*, 481 U.S. 573 (1987), that Section 8(b)(1)(B) does not reach contract interpretation but only collective bargaining or grievance adjustment activities. The judge further concluded that Henry's discussions with employees regarding disputes over their travel pay did not require him to interpret the contract and did not rise to the level of grievance adjustment. He reasoned that Henry's resolution of the travel pay disputes was ''only an everyday, routine answer to an employee question.'' Accordingly, he found that the Respondent's actions against Henry did not violate Section 8(b)(1)(B) of the Act.

The General Counsel maintains that the judge misconstrued the Supreme Court's decision in *Royal Electric* and that the authority to engage in contract interpretation is, in fact, sufficient to establish an individual's representative status under Section 8(b)(1)(B). The General Counsel further contends that internal union charges filed against Henry by the Respondent's business agent were a direct result of Respondent's disagreement with the way it believed that Henry had interpreted the contract. The General Counsel also excepts to the judge's finding that Henry is not a grievance adjuster.

We hold that a supervisor's contract interpretation function brings him within the 8(b)(1)(B) definition of ''representative'' and thus find merit in the General Counsel's exceptions.

The Board, in *Sheet Metal Workers Local 80 (Limbach Contractors)*, 285 NLRB 386 (1987), held that the union had violated Section 8(b)(1)(B) by disciplining an employer representative because of his interpretation of the collective-bargaining agreement. The Board said that in *Royal Electric*, supra, ''the Supreme Court held that Section 8(b)(1)(B) prohibits discipline of a supervisor-member only for performing 8(b)(1)(B) duties which include collective bargaining, grievance adjustment, and contract interpretation.'' 285 NLRB at 387.[1] In *Limbach*, the parties had stipulated that Supervisor Olchowik possessed authority to act as the employer's representative for purposes of collective bargaining or the adjustment of grievances. The Board further found, however, that the union's action against Olchowik was caused by his interpretation and administration of the collective-bargaining agreement with respect to the layoff of a union steward. The Board held that the union violated the Act based on a finding that the only conduct engaged in by Olchowik that was specifically complained of in notifying him of the

[1] The Board has long held that contract interpretation is an 8(b)(1)(B) activity. *Typographical Union No. 18 (Northwest Publications)*, 172 NLRB 2173 (1968).

union charges was his decision concerning the steward's layoff.

Similarly, the conduct that the Union complained about in its charges against Henry related specifically to the Union's beliefs concerning Henry's alleged interpretation of the collective-bargaining agreement with respect to assigning air conditioning specialists to work on commercial work and calculating the correct travel mileage. We find that Henry possessed the authority to interpret the contract, as demonstrated by his consulting the contract to calculate the appropriate travel pay. Although Henry denied involvement in the specific dispatches giving rise to the internal union charges, there is no ground for dispute that he possessed the authority to interpret the contract. Most significantly, the Respondent brought charges against him because of his alleged interpretation of the contract. Therefore, we find that the Respondent's charging, trying, disciplining, and fining Henry, and threatening to file a lawsuit to collect the fine all resulted from the Respondent's disagreement with his interpretation of the collective-bargaining agreement. Accordingly, the Respondent restrained and coerced Simpson Sheet Metal in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances, which includes contract interpretation. The Respondent thereby violated Section 8(b)(1)(B) of the Act.[2]

On the basis of the foregoing facts and the entire record, the Board makes the following

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusions of Law 3 and 4.

''3. Douglas Henry, at all times material herein, has been a representative of the Employer for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

''4. By filing internal union charges against Douglas Henry, disciplining and assessing a fine against him, and threatening to file a lawsuit to collect the fine, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.''

2. Add the following as Conclusion of Law 5.

''5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.''

THE REMEDY

Having found that the Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Sheet Metal Workers International Association, Local 104, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing Simpson Sheet Metal, Inc. in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances by maintaining charges against, fining, placing on probation, or threatening to file a lawsuit against Douglas Henry or otherwise disciplining him because of his performance of his collective bargaining or grievance adjustment duties.

(b) In any like or related manner restraining or coercing Simpson Sheet Metal, Inc. in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the charges brought against and the fine and probationary period imposed against Douglas Henry because of his performance of grievance adjustment duties for Simpson Sheet Metal and remove from its files all records of these matters and withdraw any lawsuit filed to collect the fine.

(b) Restore Douglas Henry to his status as a member in good standing in Respondent Local 104 with attendant rights.

(c) Notify Douglas Henry in writing that it has taken the above action.

(d) Post at its office and any place where its meetings are customarily held copies of the attached notice

[2] In our discussion above we have dealt with the activity for which the Respondent disciplined Henry as an instance of contract administration that comes within the category of ''collective bargaining'' referred to in Sec. 8(b)(1)(B). We note that it could also be viewed as a form of grievance adjustment. As the the Board observed in *Sheet Metal Workers Local 68 (DeMoss Co.)*, 298 NLRB 1000, 1003–1004 (1990), the interest that Congress was protecting through the inclusion of ''adjustment of grievances'' in Sec. 8(b)(1)(B) is implicated whenever an employee requests action from the employer's representative as to a matter governed by the contract which the representative is authorized to resolve and on which the bargaining representative and the employer may have divergent views. Accord: *Steelworkers Local 1013 (USX Corp.)*, 301 NLRB 1207, 1210 (1991). Sec. 8(b)(1)(B) protection is triggered because the employer's right to be free of union coercion of its grievance adjustment representative would obviously be compromised if the employer's representative reasonably believed he could escape union sanctions only by resolving the matter in the employee's favor even before a formal grievance could arise. Id.

Member Devaney agrees with his colleagues that, in his contract interpretation role, Henry served as an employer representative within the meaning of Sec. 8(b)(1)(B). Member Devaney, therefore, finds it unnecessary to pass on whether Henry's contract interpretation activities could also be viewed as a form of grievance adjustment within the meaning of that section.

marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Furnish the Regional Director for Region 20 signed copies of the notice for posting by Simpson Sheet Metal, Inc., at all places where notices to employees are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce Simpson Sheet Metal, Inc. in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances by maintaining charges against, fining, placing on probation, or threatening to file a lawsuit to collect the fine, or otherwise disciplining that representative for performing representative duties on behalf of Simpson.

WE WILL NOT in any like or related manner restrain or coerce Simpson Sheet Metal in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances.

WE WILL rescind the charges brought against Douglas Henry and the fine and probationary period imposed on Douglas Henry, and WE WILL remove from our files all records of these matters and WE WILL restore him to membership in good standing with all attendant rights and privileges and WE WILL notify Douglas Henry, in writing, that the fine and probationary period have been rescinded, that all records of the charge, fine, and probation have been removed, and that he will be restored to full membership.

WE WILL withdraw any lawsuit filed to collect such a fine.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 104, AFL–CIO

WE WILL withdraw any lawsuit filed to collect such a fine.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 104, AFL–CIO

Mary Vail, for the General Counsel.
Kathryn A. Sure (Wylie, McBride, Jesinger, Sure & Platten), of San Jose, California, for the Respondent.
Marilyn P. Curry (Jordan & Ferrington), of Santa Rosa, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in San Francisco, California, on February 27, 1992, on a complaint issued by the Regional Director for Region 20 of the National Labor Relations Board on August 27, 1991. The complaint is based on a charge filed by Douglas Henry, an individual (Henry), on February 26, 1991, and amended on August 21, 1991. It alleges that Sheet Metal Workers International Association, Local Union No. 104, AFL–CIO (Respondent or the Union) has committed certain violations of Section 8(b)(1)(B) of the National Labor Relations Act (the Act).

Issues

The principal issue to be decided is whether Respondent's fining Douglas Henry, a supervisory official of Simpson Sheet Metal and a member of the Union, was in contravention of Section 8(b)(1)(B) of the Act. That section prohibits labor organizations from restraining or coercing an employer in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances.[1] The evidence shows that Henry had no collective-bargaining responsibilities and the threshold issue which I must decide is whether he was his employer's representative for the ''adjustment of grievances.''

In addition, it is important to note what is not in issue here. To the uninitiated, it may appear that the Union's procedures leading to the fine and/or the size of the fine itself are either unfair or draconian. Section 8(b)(1), however, addresses neither of those matters. Instead, they are left either for the courts in collection proceedings[2] or private suit in proceedings under the Labor-Management Reporting and Disclosure Act of 1959, §§ 101(a)(5) and 102. Indeed, even the reason for the fine may seem unnecessary, particularly since the perceived wrongdoing had been corrected by the Employer. The Union's policy in this regard, wise or unwise, is not clearly barred by any other section of the Act,[3] nor

[1] The statute reads:

> Sec. 8(b) . . . It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances.

[2] Cf. *NLRB v. Boeing Co.*, 412 U.S. 67 (1973).

[3] There may be circumstances by which the conduct complained of, fining a supervisor/union member for the manner in which he performs his job, could violate the good-faith bargaining obligation

is it plainly contrary to national labor policy. It is, therefore, not the Board's duty to assess the wisdom of this policy, except to the extent that it may be a subterfuge to accomplish aims prohibited by this subsection of Section 8(b)(1).

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. The General Counsel and Respondent have filed briefs which have been carefully considered. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, Simpson Sheet Metal, Inc., is a California corporation, headquartered in Santa Rosa, California, where it is engaged in the building and construction industry as a sheet metal contractor. It sells, installs, and services heating and air conditioning systems. Its annual gross sales exceed $500,000 and it annually receives equipment and supplies from vendors outside California valued in excess of $50,000. Accordingly, Respondent admits, and I find, the Employer to be an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits it is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

As noted, the Employer is a sheet metal contractor. It is owned by Bill and Nancy Simpson, who are husband and wife. Bill is president of the corporation and it appears that Nancy may be the secretary-treasurer. Certainly she is in charge of the office and keeps the books. Henry, the Charging Party, has worked for the Company since 1978 in various capacities. He began as a journeyman sheet metal worker, served as a foreman and dispatcher from 1983 to 1988 and since that time has been ''second in charge of everything;'' his only superior being Bill Simpson. In 1988, his job dispatching (scheduling) duties were given to Bill's brother, Bernie, who is subordinate to Henry. Occasionally, in Bernie's absence, Henry will assign work to the employees.

Henry describes himself in various ways and, although one might regard them as inconsistent, I do not. He simply has ubiquitous duties, and does what has to be done. When asked what his profession is, he replied, ''Journeyman sheet metal worker.'' Later, he agreed that he does ''foreman'' work. He mainly serves as a residential estimator, meaning he puts bids together in a sales capacity. He also oversees most of the work, whether residential or commercial. There is no evidence that he currently performs any actual labor such as would be required of an active journeyman; he has advanced well beyond that into management.

Nonetheless, he has, since his apprenticeship days in 1972, maintained his membership in the Union. He considers himself a good union member and has no desire to undermine union standards. For many purposes he views himself as a member of the bargaining unit; indeed, the Union so regards him as well, for foremen are covered by the contract, and much of what he does is considered foreman's work. In fact, in recent memory he has consulted with David Browning, one of the Union's business agents for the North Bay area, over a personal pay rate matter.

It is undisputed that the Employer does not ask Henry to perform any actual collective bargaining with the Union. Bill Simpson, together with his attorney, Mark Jordan, are the individuals responsible for that portion of the business. The Employer also appears to be a member of the Redwood Empire Chapter of the Sheet Metal and Air Conditioning Contractors National Association (SMACNA), or at least bound by the SMACNA multiemployer collective-bargaining contract with Respondent. SMACNA, therefore, would appear to be the Employer's collective-bargaining representative, assuming that Bill Simpson has delegated that function to anyone. Certainly Henry is not involved in any way.

On July 21, 1989, one of Respondent's San Francisco business agents, James Sheehan, acting pursuant to the Union's constitution and by-laws, filed charges against Henry, accusing him of violating the collective-bargaining contract and engaging in conduct detrimental to the Union. More specifically, Sheehan accused him of directing rank-and-file members to work in breach of the terms of the applicable collective-bargaining contract. He contended that Henry had dispatched employees to a San Francisco jobsite, covered by the San Francisco, not the Santa Rosa, contract and had told them to work under Santa Rosa rules. This included working an 8-hour, rather than a 7-hour, day; using the Santa Rosa light commercial payscale instead of the San Francisco building trades rate; and not allowing for the proper travel allowances from Santa Rosa.

Henry denied being responsible for whatever had happened on that job. He answered the charges with a letter, dated August 4, 1989, saying his responsibilities did not include that project, as he was serving as the Company's residential estimator in Santa Rosa at the time. He affirmatively asserted that he had not dispatched any employees to it. He acknowledged that the Company had made a mistake, but says the employees were paid journeyman wages. He pointed out that claiming travel pay is first the employee's responsibility, for he must put the proper information on his timecard. He then observed that he, personally, has no responsibility to oversee the payroll and has no access to company payroll records. He therefore denied any personal involvement in, or responsibility for, the San Francisco situation.[4]

His response, putting the facts in issue, led to a hearing on Sheehan's charges. It was conducted on November 14, 1989. Sheehan called employees as witnesses in support of

required by Sec. 8(d) and enforced by Sec. 8(b)(3). If so, such a theory has not been presented here and cannot be considered. Cf., *Teamsters Local 788*, 190 NLRB 24 (1971). There, the union was found to have breached the good-faith bargaining obligation by fining a member for giving unfavorable testimony to an arbitrator who was evaluating another employee's grievance, thereby corrupting the arbitral process.

[4] The pay errors themselves appear to have been corrected earlier when the employees questioned the calculations. There is no evidence that any employee needed to file a grievance.

his accusations; Henry offered evidence to the contrary. Although the testimony conflicted, the trial committee credited the workmen. It found Henry guilty as charged and levied what can only be described as a heavy fine, $10,000, half of which was to be suspended upon payment of the first half.[5]

Henry appealed the fine to the International president, but the president denied the appeal on March 30, 1990; Henry exercised his right to appeal to the International's general executive council, but that body denied it; the general secretary-treasurer so notified Henry by letter of November 16, 1990. His only avenue of appeal thereafter was to the general convention, but it required prepayment of the fine, which Henry was unable to pay. He sought a waiver but the rules apparently did not permit the fine to be waived. Having gone as far as he could, Henry filed the instant unfair labor practice charge on February 26, 1991.

B. *Henry's Duties for the Employer*

There is no dispute that Henry is second in command of the field work performed by the workmen. He is second only to Bill Simpson. Respondent concedes that his duties are supervisory in nature and it is apparent that is so. When it comes to giving directions to employees, he certainly has independent judgment in making assignments. Indeed, so does his subordinate, Bernie Simpson. The assignment of work, dispatching and scheduling are clearly within his authority, although since 1988 those duties have been primarily Bernie Simpson's. He has never been formally involved in any grievance proceeding as those matters have been left to Bill Simpson. As a matter of timing, it appears that the first formal grievances filed against Respondent (though its recognition of the Union is longstanding) occurred after the San Francisco episode, so that incident is the first time the question of grievance-handling authority has ever come up.

There have been occasions in which Henry has been called on to concern himself with some payroll questions or some apparently employment-related matters.

With respect to pay rates, his discretionary authority is nonexistent. The Santa Rosa contract sets forth two pay rates for journeymen, one for residential work and the other for light commercial. The rate is determined by the type of structure being built. Even the San Francisco pay rates, though different, would be treated in the same manner. The contract governs and removes discretion from any employer bound by it. He also testified that he was the individual who had to seek approval for the employees to work overtime, approval which had to come from the Union, according to the contract. When overtime was approved, it was for a specific job at a contract-specified rate and for specific employees.

The most common topic discussed appears to be travel allowances. Henry says about once a month a journeyman will ask questions regarding the appropriate travel pay. He and the journeyman then look at item 10 of the collective-bargaining contract, check a map and determine what the travel pay shall be. If errors have been made, he makes the appropriate note to payroll for correction. One example of such a correction occurred with respect to an employee named Sabatino in March or April 1989,[6] where he photocopied the rule for the employee. If no error has occurred, the matter ends. He testified that he has no discretion in such matters.

Henry readily agreed with Respondent's counsel that the application of the travel rules is mechanical and easy to understand. That portion of the contract establishes zones based on either counties where the work is performed or air miles from a specific point set forth in the contract. The North Bay counties are Marin, Sonoma, Mendocino, and Lake Counties and the dispatch and mileage point is 1700 Corby Avenue in Santa Rosa. In addition, the contract provides a 20-air-mile radius ''free zone,'' measured from the Employer's shop for which no travel pay is paid. A second 20-air-mile ''free zone'' can be established for workers sent from a dispatch point other than the Employer's shop. If the work is performed outside the ''free zones,'' then travel rules come into play. Like the map radii, these, too, are mechanical. They involve nothing more than knowing who provided the transportation and the number of miles traveled past the ''free zone.'' I suspect that most questions with which Henry dealt involved map locations and distance calculations, not the interpretation of the contract language.

Similarly, another clause of that item provides that ''time and a half'' shall be the appropriate wage for driving loaded trucks before and after regular start and quit times. Again, the most likely questions Henry had to answer would have been timecard entries and whether they were before or after the regular start and quit times. Even the definition of a loaded truck is set forth in the contract. This, too, is mechanical.

Henry is also alleged to have been involved in determining premium pay and bonuses for certain journeymen who have performed exceptionally well. His testimony does not describe any specific instance where that has occurred. However, the preamble to addendum No. 1 to the SMACNA agreement contains the following sentence: ''The parties agree that the terms and conditions contained in this Agreement shall apply as the *minimum conditions* for all work performed hereunder . . . .'' [emphasis added]. Thus, even if Henry were involved in deciding whether premium pay or bonuses should be paid, who should receive it, or how much it should be, those decisions were not governed by the contract, but had been deliberately left to the Employer's discretion.

Respondent, in addition to its regular complement of journeymen, also employs apprentices. These are ''beginners'' in the industry who have formally enrolled in a training program jointly administered by the Union and employer designees. In addition to their regular workday, apprentices are obligated to complete a fixed course of schooling, apparently in the evening. The entity operating the apprenticeship program is the joint apprenticeship committee and is created by item 25 of the addendum. That article sets forth the wage of an apprentice and requires the Employer to contribute money to the committee for training. It also limits the Employer's right to discharge an apprentice, requiring the committee's approval for such a decision. Dispatching the proper ratio of apprentices to journeymen is also governed by the clause.

[5] The Union's trial record shows that Sheehan asserted that Henry does not perform collective bargaining or grievance processing for the Employer. The record is silent regarding Henry's response, if any.

[6] Sabatino was one of the employees who had been sent to San Francisco and improperly paid. It may well be, given the timing, that Henry's action here corrected the San Francisco error.

These ratios are clear and allow for little, if any, discretion. Ratios also come into play when assigning air-conditioning specialists to jobs. Again, the contract clearly specifies what those ratios are to be and Henry agrees that he, as dispatcher, has no discretion over the proper ratios. Similarly, pay rates for apprentices are mechanical as well. Depending on length of time as an apprentice, his rate is a percentage of the journeyman scale as set forth in a chart in the contract.

Each employer involved in the apprenticeship program is asked to evaluate the apprentice's progress from time to time. This Employer does participate in the plan and has designated Henry to fill out the progress reports for the committee. The Employer does not currently have a representative sitting on the committee itself, but Business Representative David Browning sits on the committee. Browning testified that the committee accepts evaluations of apprentices made by either journeymen or foremen, occasionally even accepting those made by air-conditioning specialists (who are not considered as skilled as journeymen).

On one occasion, in March 1989, the joint apprenticeship committee called some of the Employer's apprentices on the carpet to explain their excessive absenteeism from the school program. The committee was considering expulsion and on March 2 held a meeting to judge their situation. The Employer sent Henry to that meeting to explain that the apprentices' absences were not their fault, that the Employer had been sending them to jobs in locations which made it impossible for them to get to the classroom. Henry's explanation was accepted and the apprentices were reinstated, but on a probationary basis.

IV. ANALYSIS AND CONCLUSIONS

This case is the result of two separate views about the scope of Section 8(b)(1)(B). The Union argues that it should be narrowly construed; the General Counsel that it it should be read more broadly. It is true that traditionally the concept of ''collective bargaining'' includes the duty to meet and deal in good faith over employee grievances. *Timken Roller Bearing*, 70 NLRB 500, 502 (1946), revd. on other grounds 161 F.2d 949 (6th Cir. 1947); *Jacobs Mfg. Co*., 94 NLRB 1214, 1225 (1951), affd. 196 F.2d 680 (2d Cir. 1952); *Bethlehem Steel*, 136 NLRB 1500, (1962), enfd. in pertinent part 320 F.2d 615 (3d Cir. 1963); *Conoco, Inc*., 287 NLRB 548 (1987). Section 8(d) of the Act, which defines good-faith bargaining, gives the concept a broad reach. Indeed, the duty is ''continuous,'' in that it continues throughout the period during which the parties have a 9(a) exclusive relationship. Section 8(d) speaks of ''conferring'' as part of the collective-bargaining duty, meaning that the duty is ongoing even during the term of the agreement, as well as before or after.[7] The employer's representatives performing the ''conferring'' function may easily be seen as collective-bargaining representatives in the broad sense. Thus, the General Counsel's view that a person assigned to confer with the Union on the Employer's behalf is a collective-bargaining representative or grievance adjuster within the meaning of Section 8(b)(1)(B) is not an unreasonable one.

The Supreme Court, however, has recently said on several occasions that the language of Section 8(b)(1)(B) is to be narrowly construed. That approach was first highlighted by the Court in *Florida Power Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790 (1974), when it rejected the Board's contention that a violation of Section 8(b)(1)(B) occurred when a union fined supervisor-members for performing struck work. It said:

> In the present cases, the Board has extended that doctrine [referring to the San Francisco-Oakland Mailers case, discussed infra] to hold that § 8(b)(1)(B) forbids union discipline of supervisors for performance of rank-and-file work on the theory that performance of such work during a strike is an activity furthering management's interests. We agree with the Court of Appeals that § 8(b)(1)(B) cannot be so broadly read. Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances. By its terms the statute proscribes only union restraint or coercion of an employer ''in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances,'' and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment.
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> . . . *The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer*. 417 U.S. at 803–805. [Emphasis added; emphasized portion to be compared infra with certain language quoted from *NLRB v. Electrical Workers Local 340 (Royal Electric)*, 481 U.S. 573 (1987)].

That language was, at least in part, reendorsed by the Court in *American Broadcasting Co. v. Writers Guild*, 437 U.S. 411 (1978), and further clarified in *Royal*, supra. The latter case rejected the Board's so-called reservoir doctrine under which it had concluded that Section 8(b)(1)(B) covered any supervisor even if he/she did not then actually perform collective-bargaining or grievance adjustment duties, because those people were the ''reservoir'' from whom such persons would probably come and would or could be called upon to perform those duties in the future. Thus, it is fair to say that the Court's analysis of this portion of the statute is significantly more restrictive than the Board's. There is no bright line test which both the Board and the Court have adopted. Respondent asserts, with good reason, that the General Counsel is seeking to reintroduce the reservoir doctrine here; counsel for the General Counsel says she is simply following

[7] Sec. 8(d) in pertinent part: ''[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder.''

that part of the Supreme Court's *Royal* decision which approved a portion of the *San Francisco Oakland Mailers*'[8] logic.

In addition, the *Writers Guild* decision reiterated the requirement that, as a prerequisite to an 8(b)(1)(B) violation, the Board must as a factual matter ''inquire whether the [union's] sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance adjustment tasks and thereby coerce or restrain the employer contrary to § 8(b)(1)(B).'' The Court in *Royal* later described that duty as the ''crux'' of *Writers Guild*.

Thus, under the statute and the Court's construction, the Board must first determine whether the supervisor being disciplined is either a collective bargainer or a grievance adjuster; if so, it must then determine whether the discipline would actually adversely affect his/her performance of those duties.

First, it is quite clear, conceded by Respondent, that Henry in 1989 at the time the disciplinary proceedings began, was a 2(11) supervisor. It is true that one of the duties which makes one a supervisor under that section of the Act is the power to adjust grievances.[9] However, the Board has always read those powers in the disjunctive, so that the possession of only one of those attributes is sufficient to make one a supervisor. *NLRB v. St. Francis Hospital*, 601 F.2d 404, 421 (9th Cir. 1979). It is not to be read in such a fashion as to invest supervisors with those powers, that is, if you possess one, you possess all. Therefore, when Respondent concedes Henry is a 2(11) supervisor, it does not also grant that he is an 8(b)(1)(B) representative. Proof of that fact remains with the General Counsel.

To prove the contention, the General Counsel has essentially cited, without a great deal of detail, many of Henry's 2(11) duties. He certainly assigns work, transfers employees from job to job, oversees and directs their work and evaluates performance; he has the power to hire and fire. He may, though it is not clear, participate in decisions to reward employees for good work, i.e., merit pay and bonuses. Some of these things are governed by the collective-bargaining contract; most are not. For example, hiring must be done through Respondent's hiring hall and in accordance with the contract's rules. Firing is subject, in a limited way, to the grievance procedure. The contract does not appear to contain a ''just cause'' for discharge clause; nonetheless, item 24, section N requires the employer to state a reason for the discharge and section O gives the discharged employee the right to file a grievance.

The General Counsel points to Henry's ''representation'' of the Employer during the joint apprenticeship committee meeting in an effort to head off the committee's expulsion of the apprentices as somehow a ''grievance adjusting'' or ''collective bargaining'' task within the meaning of Section 8(b)(1)(B). First of all, I fail to see what the grievance was or what the collective-bargaining task was. It is true that the committee is the creature of the collective-bargaining contract, but it is an independent body, apparently established under the auspices of Section 302(c)(6) of the Act. Indeed, the employer members of such joint committees themselves have been held not to be employer representatives within the meaning of Section 8(b)(1)(B) because of that very independence and the fact that it does not engage in collective bargaining. *NLRB v. Amax Coal*, 453 U.S. 322, 337–338 (1981). If that body is independent, it is not even the agent of Respondent, so in attending one of its meetings one cannot resolve contractual grievances or be an essential part of the collective-bargaining process.[10] Accordingly, I do not see that Henry's participation in that process shows that he has any authority under this statute.[11]

That takes us to the General Counsel's principal argument, that under *San Francisco-Oakland Mailers*, supra, a supervisor becomes an 8(b)(1)(B) representative if one's duties involve contract interpretation. It is certainly true that the Supreme Court in *Royal* said:

> [W]e conclude that discipline of a supervisor-member is prohibited under Section 8(b)(1)(B) only when that member is engaged in 8(b)(1)(B) activities—that is, collective bargaining, grievance adjustment, or some other closely related activity (e.g., contract interpretation, as in *Oakland Mailers*). [Emphasis added.]

It is this language which is to be compared with the italicized quote from *Florida Power*, supra. It can be seen that the chief difference between the two is the added reference to *San Francisco-Oakland Mailers*, apparently giving that case some special approval insofar as contract interpretation may lead to a finding that a supervisor may be deemed an 8(b)(1)(B) representative. It almost appears that the *Royal* decision has added an additional method to the *Florida Power* formula for determining such a status. A careful reading, however, reveals that is not the case. Nonetheless, that appears to be the General Counsel's rationale behind the instant complaint.

An analysis of *San Francisco-Oakland Mailers* clearly shows the fallacy of that reasoning. In that case the disciplined supervisors clearly had grievance adjusting authority; it was a given in the case. See Trial Examiner Hemingway's decision, 172 NLRB at 2176:

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[8] *San Francisco-Oakland Mailers Local 18 (Northwest Publications)*, 172 NLRB 2173 (1968).

[9] Sec. 2(11) reads: ''The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or *to adjust their grievances*, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.'' [Emphasis added.]

[10] The Board had found in the underlying decision in *Royal*, that a supervisor became an 8(b)(1)(B) representative if he handled ''personal'' grievances. The Court was skeptical of that analysis, citing the Board to the congressional purpose as set forth in *Florida Power*, supra at fn. 12. I think it is now clear that ''personal grievances'' are outside the scope of the statute. If the General Counsel's reference to Henry's appearance at the joint apprenticeship committee meeting is being viewed as some sort of personal grievance authority, that opinion is without congressional warrant.

[11] Even if Henry were an 8(b)(1)(B) representative attempting to adjust a grievance, the committee members would not be able to do so for they have no such authority. Thus he would not be engaged in an 8(b)(1)(B) activity while appearing before the committee. Therefore, such an appearance would not be evidence of his 8(b)(1)(B) authority. Such evidence would come from some other source.

> These assistants direct the work and, when the head foreman is not present, they may (within the limits of the contract) call for additional men, lay off men, make initial decisions on grievances, and send a man home for cause and recommend his discharge. . . . [A]nd, if the head foreman is not, even temporarily, available at the time a grievance arises, the chapel chairman [union steward] will take up grievances or disputes initially with the assistant foreman. In such instance, the assistant foreman is acting as a representative of management. . . . And the fact is that the [Employer] has designated the foreman and, in his absence, the assistant foreman, as its representative to make *initial decisions in the adjustment of grievances or the settlement of disputes arising under the contract.* [Emphasis added.]

Analytically, therefore, the question of whether those foremen interpreted the contract had no bearing on whether they were 8(b)(1)(B) representatives. They had been given specific authority as such by the employer; it was a fact and legal conclusion which was not in dispute and unnecessary to prove.

To what then, was the Supreme Court in *Royal* referring? In context, it was referring to the second element of the violation, that even where a supervisor-member is an 8(b)(1)(B) representative, no violation can be made out unless the union's discipline ''may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.'' It is the reappearance of the *Florida Power* language, previously utilized as the ''crux'' in *Writers Guild* to show that fining the *Writers Guild* supervisor-members did in fact interfere with their grievance adjusting authority, thereby resulting in a violation of Section 8(b)(1)(B).

Thus, in using that language, the Court in *Royal* was balancing the right of an employer to have an unfettered collective bargainer or grievance adjuster against a union's right to impose its rules on its own members, whether they were supervisors or not. In some situations, it reasoned, even an 8(b)(1)(B) representative can be subjected to union discipline without running afoul of that section of the Act. *Writers Guild* clearly allows for that possibility. Therefore, the General Counsel's contention that Henry's ''contract interpretation'' authority renders him an 8(b)(1)(B) representative is a nonsequitur and not an element of proof of the issue.

Curiously, however, the only area of Henry's duties which might be considered interpretation of the collective-bargaining contract is that dealing with travel pay. Yet it is undisputed that the provision requires nothing more than a mechanical application of distance measurements and appropriate mathematical calculations. That sort of ''interpretation'' is hardly the sort of skill which the Court would regard as committed to resolving even less than complex distinctions which might be drawn from a contract. Clearly the Court was not concerned with so-called ''pre-grievance'' processing. Obviously, if an employee has a complaint about a working condition or a claim under the collective-bargaining contract, he or she is likely to first discuss it with the first line supervisor. Even if that individual reads the contract and makes a decision, whether favorable or unfavorable to the employee, it does not necessarily amount to ''grievance adjustment'' as that phrase is used in the statute. If that were true, nearly every employment related decision made by a supervisor would render him an 8(b)(1)(B) representative. Given the Court's determination that the statute has a specific and quite narrow purpose, such an analysis cannot withstand its scrutiny for it is far too broad.

Therefore, I conclude that Henry's reading and explaining the travel pay rules, or photocopying them for an employee's benefit, cannot even constitute a ''pre-grievance'' resolution; certainly it does not rise to any formal or semiformal grievance resolution. It is only an everyday, routine answer to an employee question. It is true that the employee may later disagree with the explanation by filing a grievance or taking it to a union official for explanation or further processing. Not until then would the employer need a grievance adjuster on the scene. The identity of that person and the nature of his authority would depend on the needs and desires of higher management. Not every employer will respond in the same manner.

Here, Henry was only a potential grievance adjuster, i.e., part of the ''reservoir.'' The authority had never been given him, even though he was either a foreman or a general foreman. Bill Simpson had yet to make a decision on the point at the time Respondent filed charges against Henry. Indeed, there is no evidence in this record that Simpson ever made such a decision, much less gave that power to Henry.

Accordingly, I find that the General Counsel has failed to demonstrate that the Employer had appointed Douglas Henry as a collective bargainer or grievance adjuster as those terms are used in Section 8(b)(1)(B). The discipline levied on Henry for the manner which employees were paid is outside the reach of the Act. The complaint shall therefore be dismissed.

CONCLUSIONS OF LAW

1. The Employer, Simpson Sheet Metal, Inc., is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent, Sheet Metal Workers International Association, Local Union No. 104, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Douglas Henry is not a representative of the Employer within the meaning of Section 8(b)(1)(B) of the Act.

4. Respondent's discipline of Henry, therefore, did not constitute a breach of Section 8(b)(1)(B) of the Act.

[Recommended Order for dissmisal omitted from publication.]